Supreme Court, U.S.
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No. 97-

In The
Supreme Court of the United States
October Term, 1996

ROBERT LANE,

Petitioner,

vs.

MINISTRY OF DEFENSE,
STATE OF ISRAEL

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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63 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is a foreign sovereign which engages in commercial activity in the United States and, by reason of criminal actions committed during the course of that commercial activity, damages an American citizen by proximately causing him to lose his job, immune from liability under the Foreign Sovereign Immunities Act?

2. Is a foreign sovereign which engages in commercial activity in the United States immune from suit based upon that commercial activities?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Robert Lane, the respondent Ministry of Defense, State of Israel[1], and Defendant National Airmotive Corporation ("NAC"), a California corporation, with its principal place of business in Oakland, California.

[1] Plaintiff's reference to the Ministry of Defense, State of Israel, is intended to refer to the State of Israel, a foreign state, not to any agency or instrumentality thereof.

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No. 97-

In The
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October Term, 1996

ROBERT LANE,

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v.

MINISTRY OF DEFENSE,
STATE OF ISRAEL

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Petitioner, Robert Lane, respectfully prays for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on January 3, 1997.

OPINIONS BELOW

The Opinion (A-3) of the Court of Appeals for the Ninth Circuit ("Ninth Circuit") below is unpublished. The trial court's Order denying Respondent's motion to dismiss pursuant to Federal Rules of Civil Procedure Rule 12(b)(1) (Appendix A-13) is also unreported.

JURISDICTION

The decision of the Ninth Circuit in this case was entered on January 3, 1997. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The statute involved in this case is 28 U.S.C. § 1602 et seq. (the Foreign Sovereign Immunities Act).[2] The pertinent text is set out in the Appendix, at pp. A-35 - A-41.

STATEMENT OF THE CASE

Petitioner brought his instant suit in the Northern District of California against Respondent pursuant to 28 U.S.C. § 1330(a) and the Foreign Sovereign Immunities Act (28 U.S.C. § 1602 et seq., "FSIA") on three claims:

(a) declaratory relief concerning the rights of the parties in regard to Petitioner's termination;

(b) for money damages for loss of property occurring in the United States caused by the tortious acts and/or omissions of Respondent; and,

(c) breach of contract as a third party beneficiary.

The FSIA provides Respondent with immunity from suit unless, as here, certain exceptions set forth in the FSIA apply to the facts of Mr. Lane's case.

Respondent moved for dismissal, for alleged lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure. On September 15, 1995, the District Court for the Northern District of California denied Respondent's motion, holding that it had jurisdiction over Respondent under the "commercial

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[2] Unless otherwise noted, all references hereinafter to the United States Code are to Title 28, Section 1602 et seq.

activity" exception to Respondent's immunity under the FSIA, Section 1605 (a)(2). On interlocutory appeal, the Ninth Circuit, in an unpublished decision, reversed the District Court and directed the lower court to dismiss the complaint against Respondent. The instant petition is from that order and decision.

Petitioner asserts that the District Court had jurisdiction against Respondent under the FSIA and 28 U.S.C. § 1330(a), with supplemental jurisdiction against Defendant National Airmotive Corporation ("NAC") under U.S.C. § 1367(a).

Petitioner is a citizen of the United States. From January 1982 until his wrongful termination on August 26, 1993, he was employed by Defendant NAC in Oakland, California.

Beginning in or about August 22, 1985, Respondent entered in the United States into a series of contracts, and amendments thereto, with NAC for provision in the United States of services, technical assistance, spare parts, and materials required to repair and remanufacture engines for the use of Respondent ISRAEL's Air Force. NAC and ISRAEL also entered into subsequent purchase orders for particular commercial items and services not covered by these contracts and the amendments thereto. Said orders were also performed in the United States.

Mr. Lane, as Manager of Special Programs, Director of Customer Support and Director of Special Programs, acted, at Israel's specific request and pursuant to his contract of employment with NAC, as the central coordinator, the "Israel Desk Manager", regarding technical and administrative questions, for Respondent, in regards to Respondent's contracts with NAC. See Volume I of Respondent's Exhibits to Appellant's Request For Judicial Notice ("EXHIBITS Vol. 1") (alleged "contracts #200/50043-02-T-122 #1013", Section 5, page C-7, "NAC has established a Special Israel Desk Manager whose primary responsibility is to manage schedules, general administration and specific projects required by the agreement."). See also, to the same effect, Respondent's Exhibits to Appellant's Request For Judicial Notice, Vol. II

("EXHIBITS, Vol. II"), Section 5, page C-8. As the Ninth Circuit stated (A-3, Decision at p. A-4), Petitioner's "primary responsibilities were related to NAC's military supply contracts with Israel."

Petitioner alleges that Respondant, in the course of its said commercial transactions with NAC, committed certain tortious acts in the United States including, but not limited to, attempting to conspire with NAC to set aside funds, in one or more special accounts, known as the "Special Project Fund", for use by Respondent for purposes that had not been approved or authorized for funding by the United States. The existence and use of such accounts were required by United States law to be made known to the United States but were not made known to the United States. Petitioner further alleges that, as a proximate result of Respondant's said tortious and criminal actions, Petitioner lost his job with NAC on August 27, 1993. In its notice of termination, NAC informed Mr. Lane that, "[t]he basis for termination include your involvement in various unlawful acts relating to the Government of Israel contract. . ." (see Appendix A-29). Mr. Lane also alleges that Respondent breached its contracts with NAC to his detriment as a third party beneficiary thereof.

Mr. Lane filed his complaint in the United States District Court for the Northern District of California, against Respondent and NAC on August 3, 1994. On July 20, 1995, Respondent moved to dismiss Mr. Lane's complaint under Rules 12(b)(1) and (b)(6), F.R. Civ. P. On September 15, 1995, the District Court denied Respondent's motions (Decision at A-13).

Petitioner has never been indicted, tried or convicted of any wrongdoing in regard to contracts between NAC and Respondent ISRAEL. However, Yechiel Bart, who worked from July 1986 through August 1990 for Respondent, and was Respondent's buying agent, directly involved with the commercial contracts between NAC and Respondent, was indicted, tried, and convicted of twenty-nine (29) felony counts of conspiracy against the United States in regard to said contracts. Mr. Bart is presently imprisoned for said

crimes (See Appendix A-31, A-32, Conviction of Bart). Mr. Lane was subpoenaed by the Grand Jury for the Western District of Texas during its investigation of Mr. Bart's activities in connection with Respondent's contracts with NAC (See Appendix A-33).

The District Court below found that the "commercial activity" exception to the FSIA (Section 1605 (a)(2)) applied to Mr. Lane's action; to wit, that Mr. Lane's Second Cause of Action is based upon that commercial activity and alleges that, in connection with the performance of said contracts, certain specifically identified tortious acts occurred. Therefore, the District Court concluded, Mr. Lane's Second Cause of Action, at least, "arises out of commercial activity." Consequently, the District Court held, it had subject matter jurisdiction over Mr. Lane's action against Respondent and denied Respondent's 12 (b)(1) motion.[3]

REASON WHY A WRIT OF CERTIORARI SHOULD BE GRANTED IN INSTANT CIRCUMSTANCES

Petitioner seeks a Writ of Certiorari to the Ninth Circuit to reverse the decision in his case for four reasons:

1) the Circuit Court's decision misconstrues and incorrectly applies this Court's decision in Saudi Arabia v. Nelson 507 U.S. 349 (1993);

2) the Circuit Court's decision conflicts with the decision of other Circuit Courts on certain essential issues:

3) Petitioner's matter raises a serious issue which needs to be addressed by this Court; to wit, whether a foreign sovereign is immune from suit under the FSIA for crimes it commits in the United States in connection with its commercial activity in this country, brought by the American citizen damaged by the loss of his property proximately caused by said criminal activity;

4) the Circuit Court's decision misinterprets the interaction between Section 1605(a)(2) and 1605(a)(5)(B).

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[3] The District Court expressly did not rule on the remainder of Respondent's motion.

Under the FSIA, Respondent is presumptively immune from the jurisdiction of the United States courts, Unless a specified exception set forth in the FSIA applies to his suit, the federal courts lack subject matter jurisdiction over Mr. Lane's claims against Respondent. 28 U.S.C. § 1604, 1605 to 1607. Nelson, supra, U.S. at p. 335; Verlinden B.V. v. Central Bank of Nigeria 461 U.S. 480, 488-489, 493 (1983); Argentine Republic v. Amerada Hess Shipping Corp. 488 U.S. 428, 435 n.3, 443 (1989).

Mr. Lane's complaint alleges facts which show that at least two of the exceptions set forth in the FSIA to Respondent's sovereign immunity exist as to his suit:

a) the "Commercial Activity" exception (first cause of Section 1605(a)(2)), which provides, in pertinent part, that a foreign state is not immune from suit in "any case in which the action is based upon a commercial activity carried on in the United States by the foreign state. . ." See Republic of Argentina v. Weltover 504 U.S. 607, 610-617 (1992); and,

b) the non-commercial torts exception (28 U.S.C. § 1605 (a)(5)).

As the Ninth Circuit properly held (Appendix at A-3, Decision p. A-8), military supply contracts - here Respondent's contracts with NAC to purchase services, equipment and supplies for its Air Force, are "commercial activity." See Weltover, supra, U.S. at pp. 614-615 (a contract to buy army boots or even bullets is a "commercial activity"). Misapplying this Court's decision in Nelson, supra, however, the Ninth Circuit erroneously held that Mr. Lane's claims against Israel are not "based upon" Israel's commercial activities in the United States; to wit, its said contracts, of which he was the central coordinator and "Israeli Desk Manager." It is clear from Mr. Lane's complaint, however, that each of his claims against Respondent is "based upon" Respondent's commercial activities in the United States. Mr. Lane's First and Second Causes of Action allege loss of his job with NAC. Mr. Lane had a property right in his job under California and New

York law)[4]. His termination was based, according to NAC, in its letter of termination, upon his alleged "involvement in various unlawful acts relating to the Government of Israel contract. . ." (see Appendix A-24); Mr. Lane's Second Cause of Action alleges loss of job proximately caused by Respondent's tortious activities occurring in the United States during the course of its commercial activities in this country. His Third Cause of Action alleges that Respondent breached its contracts with NAC to Mr. Lane's detriment.[5]

Certiorari should be granted to reverse the Ninth Circuit's decision below since the Ninth Circuit clearly misapplied this Court's holding in Nelson, supra, in erroneously finding that Mr. Lane's claims are not "based upon" Respondent's commercial activity in the United States.

In Nelson, supra, U.S. at pp. 356-358, this Court held that, for purposes of the "commercial activity" exception set forth in the first clause of Section 1605(a)(2), the term "based upon" means, "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." "An action is based upon the elements that prove the claim, no more and no less." (ibid). Here, Respondent's commercial activity in the United States; to wit, its execution and performance of its military supply contracts with NAC, are an essential element of Mr. Lane's claims since he alleges that, as part of that commercial activity, Respondent breached those contracts to his detriment and committed certain tortious and

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[4] The contracts between Respondent and NAC provide that any disputes arising under said contracts will be governed by New York law. The District Court did not decide which state's law governs Respondent's liability vis-à-vis Mr. Lane.

[5] The question of whether Mr. Lane has an enforceable third party beneficiary claim against Respondent goes to the merits of his claim, not to the issue of immunity and subject matter jurisdiction. Rush-Presbyterian St. Luke's Medical Center v. Hellenic Republic_ 965 F.2d 699 (7th Cir., 1992); Ministry of Supply, Cairo, v. Universe Tankships, Inc. 708 F.2d 80 (2nd Cir., 1983).

criminal acts which proximately caused the loss of his property; to wit, his job with NAC.

Mr. Lane's claims allege more than a "mere connection with", or "relation to" Respondent's commercial activity in the United States, Nelson, supra. Rather, they are based directly upon those activities and allege elements which, taken as true for purposes of Respondent's 12(b)(1) motion and if proven, would entitle Mr. Lane to relief under his theory of the case. Focusing upon the "gravamen of the complaint" (Nelson, supra, U.S. at p. 357), upon the elements that prove Mr. Lane's claims (ibid), the "elements of [Mr. Lane's] claim that, if proven, would entitle [him] to relief under his theory of the case" (Nelson, supra, U.S. at p. 357), it is clear that each of Mr. Lane's claims against Respondent is "based upon" Respondent's "commercial activity" in the United States. Respondent's performance of its contracts with NAC and its related commercial activities are the "specific acts that form the basis of [Mr. Lane's] suit." Nelson, supra.

Contrary to the Ninth Circuit's erroneous opinion (Appendix at A-3, Decision at p. A-7), Mr. Lane's action is not similar to that of the plaintiffs in Nelson, supra. In Nelson, supra, this Court found that, although the plaintiffs relied solely upon the "commercial activity" exception to Saudi Arabia's sovereign immunity, the plaintiffs' claims were based, not upon Mr. Nelson's contract of employment or the Saudi government's commercial activities but, rather, upon an alleged abuse of the Saudi government's police power, a sovereign - as distinct from a commercial - activity. Unlike Mr. Lane, the Nelsons did not allege breach of contract. Unlike the Nelsons, Mr. Lane bases each of his three causes of action against Respondent upon its commercial activity in the United States.[6]

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[6] Since, as the Ninth Circuit correctly holds, Respondent's contracts with NAC were commercial activity, the breach of those contracts, alleged by Mr. Lane in his Third Cause of Action, is also a commercial activity within the meaning of the "commercial activity" exception. See Walter Fuller Aircraft Sales v. Republic of the Philippines (5th Cir.,

Certiorari should, therefore, be granted in the instant case because the Ninth Circuit's opinion is clearly contrary to and misapplied this Court's clear ruling in Nelson, supra, when it erroneously held that Mr. Lane's allegations were not "based upon" Respondent's commercial activities. Since each and every one of Mr. Lane's claims against Respondent is based upon Respondent's commercial activity in the United States, and, thus, Respondent lacks immunity under the FSIA as to these claims, the District Court properly held that it had subject-matter jurisdiction over Respondent and properly denied Respondent's 12(b)(1) motion.

Certiorari should also be granted because the Ninth Circuit's decision conflicts with the decision of the Seventh Circuit in Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic (7th Cir., 1989) 877 F.2d 574. In its opinion below, the Ninth Circuit erroneously held that the FSIA's "commercial activity" exception does not apply to Mr. Lane's claim because:

> These claims are not based upon any commercial activity between Mr. Lane and Israel. There was, in fact, no commercial relationship between Mr. Lane and Israel. (Appendix A-3 , Decision at p. A-10).

The Ninth Circuit cites no authority for its requirement that the commercial activity required by the FSIA be a commercial relationship existing directly between the foreign state and the plaintiff. The FSIA contains no such requirement. This Court has never imposed any such requirement and should not permit the Ninth Circuit to do so in the instant case.

1992) 965 F.2d 1375, 1386 (where act of contracting was commercial, breach of contract is also commercial). Prior precedent of the Ninth Circuit also so holds. See Joseph v. Office of Consulate General of Nigeria 9th Cir., 1987) 830 F.2d 1018, 1024 (breach of contract claim against a foreign sovereign may be heard pursuant to the commercial activity exception). In its opinion below however, the Ninth Circuit neither mentioned, distinguished nor followed this precedent.

In Rush, supra, the Seventh Circuit made clear that there need be no commercial relationship or contract directly between the plaintiff and a foreign sovereign in order for the "commercial activity" exception to apply; that whether such a direct relationship exists is irrelevant to whether a "commercial activity" occurred in the United States.

In Rush, supra, the Greek government entered into a contract with an Organ & Tissue Bank in Chicago, by which the Bank agreed to provide transplant operations to Greek nationals at local Chicago hospitals. Several Greek patients were sent to Rush and South Chicago hospitals for operations. These hospitals subsequently sued for moneys allegedly due and owing to them for those operations. The district court held that Greece's execution of the contract in question was a commercial activity, that the transaction bore a sufficient connection to the United States to support subject matter and personal jurisdiction, and that the plaintiffs had alleged direct financial injury in the United States due to Greece's breach of contract. Therefore, the district court concluded, sovereign immunity did not bar the suit. The Seventh Circuit affirmed, holding the "commercial activity" exception applied and, most pertinently, that it was "immaterial" that the plaintiffs were not themselves parties to the defendants' commercial activities. Rush, supra at p. 582.

Moreover, Mr. Lane did, in fact, have a direct commercial relationship with Respondent's contracts with NAC. As the "Israeli desk manager", his "primary responsibilities were related to NAC's military supply contracts with Respondent." (Appendix A-3, decision at p. A-4).

Contrary to the Ninth Circuit's erroneous belief (Appendix at A-3, Decision at pp. A-4, A-10), Mr. Lane's action against Respondent is not "essentially a wrongful termination suit." He is suing NAC for wrongful termination. He is not suing Respondent for wrongful termination, but inter alia, for proximately causing the loss of his job by its torts in the United States (Second Cause of

Action) and for breach of its contract with NAC to his detriment as a third party beneficiary thereof (Third Cause of Action).

The fact that Mr. Lane is suing NAC for wrongful termination does not prohibit him from suing Respondent for its own separate and independent acts, nor does it release Respondent from its liability therefor. The Ninth Circuit cites no authority to the contrary to support its finding. Under both federal and California law, to render a person liable, that person's negligence need not be the sole cause of an injury. It is sufficient if it is a proximate cause of the injury. There may be more than one proximate cause of an injury. The fact, therefore, that Mr. Lane suffered injury as a result of NAC's termination of his employment does not mean that he did not suffer injury as a result of the loss of his job caused by Respondent's criminal/tortious actions, nor damages from Respondent's breach of its contracts:[7]

> "If an injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening cause with regard to the other." Taylor v. Oakland Scavenger Co. (1941), 17 Cal. 2d 594, 602; American Motorcycle Assn. v. Superior Court (1978) 20 Cal. 3d 578, 586-587.

Certiorari should also be granted because the Ninth Circuit's decision raises a matter of serious importance; to wit, whether a foreign state should be immune for its criminal activities in the United States which causes loss of property to an American citizen in the United States. Mr. Lane alleges facts which show that the FSIA's "non-commercial tort" exception applies to his Second Cause of Action against Respondent, 28 U.S.C § 1605(a)(5). The illegal acts (torts and crimes) committed by Respondent in the United States, alleged by Mr. Lane in his Second Cause of Action, proximately caused Mr. Lane's loss of his property/job.

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[7] Grand Trunk R.R. Co. v. Cummings 106 U.S. 700, 702 (1882); Miller v. Union Pacific R.Co. 290 U.S. 227, 236 (1933).

Respondent defied and ignored the provisions of both its contracts with NAC (which set forth the manner in which payments were to be made for NAC's services) as well as United States law and regulations regarding procedures for payment.

A foreign government should not be permitted to commit criminal activity in the United States which causes a United States citizen to lose his property and, then, escape liability therefor because of an alleged but meritless claim of immunity. The FSIA clearly holds that such activity is not immune. See Section 1605(a)(5). The Ninth Circuit, however, by holding that the District Court has no jurisdiction over Mr. Lane's Second Cause of Action has held Respondent immune for its criminal and tortious acts in the United States. This Court should not permit this miscarriage of justice to stand uncorrected. See 28 U.S.C § 1602 (purpose of the FSIA is to insure justice to litigants).

Contrary to the Ninth Circuit's opinion, Mr. Lane's loss of property claim does not "only arise from the third party beneficiary claim" (Appendix at A-3, Decision at p. A-11 emphasis added). His loss of property claim (Second Cause of Action) is separate and distinct from his breach of contract claim (Third Cause of Action). Petitioner's Second and Third Causes of Actions are separate and independent causes of actions.

Certiorari should be granted to clarify that Section 1605(a)(2) encompasses tortious activity occurring in the course of commercial activity, although such tort claims are barred in a non-commercial context under Section 1605(a)(5)(B). Thus Respondent is liable for the tortious acts complained of in Petitioner's Second Cause of Action, which tortious acts occurred during the course of and were "based upon" Respondent's commercial activity in the United States.

The "commercial activity" exception applies to Mr Lane's Second Cause of Action since that exception encompasses "business torts" (House Report No. 94-583 at p. 17, 1976 United States Code Congressional and Administrative News at pp. 6615-6616) (the

definition of "a commercial activity carried on in the United States by a foreign state" "includes cases based on... business torts occurring in the United States..."

Congress could not have provided a more explicit and unequivocal indication of its intent to have all commercial activities, including those torts enumerated in Section 1605(a)(5)(B), be exempt from sovereign immunity. Export Group v. Reef Industries, Inc. (9th Cir., 1995) 54 F.3d pp 1476-1477.

The Ninth Circuit itself has previously recognized this in Export Group, supra. In that decision, the Ninth Circuit held that a district court has subject matter jurisdiction over a claim for interference with contract rights under the "commercial activity" exception of the FSIA, that the exceptions set forth in Section 1605(a)(5)(B) are limited to the "noncommercial torts" exception of Section 1605(a)(5) and do not limit the scope of the "commercial activity" exception of Section 1605(a)(2). The Ninth Circuit Court further held therein that Section 1605(a)(5)(B) does not restore sovereign immunity for such tort claims where the tortious activities are committed in the course of a "commercial activity" as defined in Section 1605(a)(2); that a foreign state is not immune from a tort claim for interference with contracts rights included in Section 1605(a)(5)(B) when the tort is committed in the course of commercial activity. Export Group, supra.[8]

Although this Court has never decided whether the exceptions listed in Section 1605(a)(5)(B) restrict the "commercial activity" exceptions of Section 1605(a)(2), it is clear from the FSIA's plain language and legislative history that the decision in Export Group, supra, is correct and should have been applied to

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[8] The Ninth Circuit erroneously holds (Appendix A-3, decision at p. A-9) that Mr. Lane's Second Cause of Action alleges interference with contractual rights. As Respondent itself admits, Mr. Lane is not alleging "interference with existing [or prospective] contractual relations" in his Second Cause of Action (see P&A at p. 15:20-16:4, 17:3-24) but, rather, a monetary claim for loss of property.

Mr. Lane's action. The Ninth Circuit, however, in its opinion in Mr. Lane's action, neither mentioned, followed nor attempted to distinguish Export Group, supra.

The Ninth Circuit's opinion in Mr. Lane's case on this point conflicts not only with its own prior decision of law (see Siderman de Blake v. Republic of Argentina (9th Cir., 1992), 965 F.2d 699, 710 (holding that a claim for interference with business relationships is not subject to immunity because it falls squarely within the commercial activity exception) but also with the decision of the Circuit Courts in Gould, Inc. v. Pechiney Ugine Kuhlmann (6th Cir., 1988), 853 F.2d 445, 447, 452-453 (exception under 1605(a)(2) for interference with contractual relationship claim) and Walter Fuller Aircraft Sales v. Rep. of Philippines (5th Cir., 1992) 965 F.2d 1375, 1388-1389 (subject-matter jurisdiction is properly exercised over tort claim under Section 1605(a)(2); Section 1605 does not restrict the nature of the cause of action that may be asserted against a foreign sovereign over whom there is subject matter jurisdiction, but merely eliminates immunity in any case in which the action is based upon commercial activities).

Certiorari should be granted to resolve this conflict of authority concerning the scope of Section 1605(a)(2) and the interplay between that Section and Section 1605(a)(5)(B). Properly construed, the FSIA does not bar Mr. Lane's Second Cause of Action. The tortious activity alleged therein is encompassed by the "commercial activity" exception to Respondent's immunity.[9]

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[9] Moreover, the Ninth Circuit clearly misconstrues Mr. Lane's Third Cause of Action when it characterizes it as a claim for interference with contractual rights, rather than, as properly construed, a claim for breach of contract.

CONCLUSION

The Court of Appeals for the Ninth Circuit erroneously concluded that Respondent is immune from Petitioner's suit under the Foreign Sovereign Immunities Act. For the foregoing reasons, Certiorari should be granted in the instant case in order to properly implement the Congressional mandate underlying the FSIA; to wit, to serve the interests of justice and protect the rights of litigants in United States courts by deciding claims of foreign states to immunity in conformity with the principles set forth in the said Act, 28 U.S.C. § 1602.

Where, as here, one or more of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject matter jurisdiction under Section 1330(a). Verlinden B.V., supra, U.S. at p. 489. Certiorari should be granted and the Ninth Circuit's decision reversed.

Dated: March 26, 1997.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
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Cathy A. Catterson, Clerk
U.S. Court of Appeals

ROBERT LANE, Plaintiff-Appellee, v. NATIONAL AIRMOTIVE CORP. Defendant, and MINISTRY OF DEFENSE, STATE OF ISRAEL Defendant - Appellant.	No. 95-16968 D.C. No. CV-94-02785-CAL MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted, November 4, 1996
San Francisco, California

Before: RONEY,** BEEZER AND TROTT, Circuit Judges.*

*This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The Ministry of Defense of the State of Israel ("Israel") appeals the district court's denial of its motion to dismiss based on lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq. We have jurisdiction pursuant to the collateral order doctrine, and we reverse.

I

Plaintiff - Appellee Robert Lane sued his employer, National Airmotive Corporation ("NAC"), and Israel in what is essentially a wrongful termination suit. lane worked for NAC from January, 1982 until he was fired in August 1993. His primary responsibilities were related to NAC's military supply contracts with Israel. As a result of a Department of Justice investigation of the contractual relationship between NAC and Israel, NAC and the Department of Justice signed a series of plea agreements pursuant to which NAC paid both criminal and civil fines.

According to Lane, a subsequent NAC internal investigation cleared him of any responsibility for the wrongdoing

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**The Honorable, Paul Roney, Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation.

with respect to the contract with Israel. Nonetheless, Lane was placed on administrative leave in June, 1993 and then terminated in August of that year because of his "involvement in various unlawful acts relating to the Government of Israel contract and [his] commission of other improper acts, such as [his] unauthorized removal of a sensitive document from the company's premises."

In his wrongful termination action against NAC, Lane included three claims against Israel, invoking federal subject matter jurisdiction under the FSIA. Lane's claims against Israel consist of : (1) a request for declaratory relief stating the rights and duties between the parties: (2) a request for damages for loss of property (his job) caused by tortious acts on the part of the government of Israel; and (3) a third party beneficiary breach of contract claim.

Israel moved to dismiss based on lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12 (b) (1) and failure to state a claim under Rule 12 (b) (6). The district court denied the 12 (b) (1) motion and refused to rule on Israel's accompanying 12 (b) (6) motion. Israel timely appealed the district court's order:

II

Under the collateral order doctrine, this court has jurisdiction to hear the appeal from the district court's denial of Israel's motion to dismiss based on lack of subject matter jurisdiction. Schoenberg v. Exportadora de SAL, 930 F.2d 777, 779 (9th Cir. 1991). Interlocutory orders are appealable when they "conclusively determine the disputed question, resolved an important issue completely separate from the merits of the action, and are effectively unreviewable on appeal from final judgment." Compania Mexicana de Aviacion, S.A. v. United States District Court, 859 F.2d 1354 (9th Cir. 1988) (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949)). Because the district court's refusal to grant immunity satisfies all three of these requirements, it is an appealable interlocutory order. Id.

Jurisdiction to review collateral orders, however, does not confer pendent appellate jurisdiction. See Todd v. United States, 849 F.2d 365, 368 (9th Cir. 1988) (appeal of the denial of qualified immunity is limited to the question of immunity); United States v. Yellow Freight Sys., Inc., 637 F.2d 1248, 1251 (9th Cir.), cert.

denied, 454 U.S. 815 (1981) ("[I]mmediate appealability of one of the defendants' claims will not confer pendent appellate jurisdiction over defendants' other claims."). Contrary to Israel's assertion, we do not have jurisdiction to review the sufficiency of plaintiff's claim.

III

The FSIA provides the exclusive basis for federal jurisdiction over suits involving foreign sovereigns. Export Group v. Reef Indus., Inc., 54 F.3d 1466, 1469 (9th Cir. 1995). We review de novo the existence of subject matter jurisdiction under the FSIA. Id.

The FSIA creates a presumption of immunity, and federal jurisdiction does not attach unless one of the statutory exceptions applies. Randolph v. Budget Rent-A-Car, 97 F.3d 319, 324 (9th Cir. 1996) If plaintiff puts forth evidence that an exception to the FSIA applies, the defendant bears the burden of proving that the exception does not apply. Id.; Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 707-08 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993).

The parties agree that Israel is a foreign sovereign. Israel is therefore immune from suit unless one of the exceptions applies. Lane contends that two of the exceptions to the FSIA, the commercial activity exception and the noncommercial tort exception, apply to his claim against Israel. 28 U.S.C. § 1605 (a) (2), (5).

A.

The commercial activity exception reads in relevant part: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ." 28 U.S.C. § 1605 (1) (2).

Lane contends that his claims against Israel are based upon commercial activity: the military supply contracts between NAC and the State of Israel. Although military supply contracts are considered commercial, Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614-15 (1992); Joseph v. Office of the Consulate Gen. of Nigeria, 830 F.2d 1018, 1023 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988), the question raised by Israel's appeal is

whether Lane's claim is "based upon" the contracts for the purposes of the FSIA.

The Supreme Court held in Saudi Arabia v. Nelson, 507 U.S. 349 (1993), that in order for jurisdiction to attach, the particular allegations of a complaint must be based on specific commercial activity by the foreign sovereign defendant. Id. at 358. The injuries alleged or the elements of the claim must have "more that a mere connection with, or relation to, commercial activity." Id. In Saudi Arabia v. Nelson, the commercial activity cited by the plaintiffs consisted of recruitment and hiring of medical personnel by the Saudi government. The crux of the complaint, however, was the torture and punishment inflected on the plaintiff by Saudi officials. The Supreme Court held that the commercial activity was not sufficiently related to the injuries alleged in the complaint to confer jurisdiction under the FSIA. Id. In shout, there must be a nexus between "the defendant's commercial activity in the United States and the plaintiff's grievance." American West Airlines, Inc. v. GPA Group Ltd., 877 F.2d 793, 796 (9th Cir. 1989).

Lane's claims are, in essence, wrongful termination claims against NAC. These claims are not based upon any commercial activity between Lane and Israel. There was, in fact, no commercial relationship between Lane and Israel. Lane had an employment relationship with NAC; NAC had a contract and a commercial relationship with Israel. Just as in Saudi Arabia v. Nelson, the injuries alleged in the complaint are not more than "merely related' to the commercial activity of the foreign sovereign. Lane's grievance arises from his termination by NAC and out of his employment relationship with NAC. His claims are based not upon Israel's commercial conduct in the United States but upon actions taken by NAC. The commercial activity exception does not apply to Lane's claims against Israel.

B.

Lane also contends that the noncommercial tort exception of the FSIA, 28 U.S.C. § 1605 (a) (5), applies to his complaint against Israel. Section 1605 (a) (5) provides that a foreign state is not immune from suit when "money damages are sought against a foreign state for personal injury or death, or damage to or loss of

property, occurring in the United States and caused by the tortious act or omission of that foreign state." An exception to this withholding of immunity states that foreign sovereigns retain immunity for noncommercial torts "arising out of interference with contract rights." Id. § 1605 (a) (5) (B).

Lane contends that his loss of property claim subjects Israel to suit under the noncommercial tort exception. This exception does not apply to Lane's action. Rather, Lane's claim is properly analyzed under the commercial activity exception, section 1605 (a) (2). However, even if Lane's action is characterized as a noncommercial tort claim, Israel retains immunity under section 1605 (a) (5) (B). Lane's loss of property claim could only arise from the third party beneficiary claim, and this is essentially a claim arising out of interference with contract rights. The exception to the noncommercial tort exception therefore preserves immunity for Israel. § 1605 (a) (B).

IV

Lane's complaint is not "based on" commercial activity for the purpose of the FSIA, and any noncommercial tort alleged in the

complaint arises out of interference with contract rights. We therefore reverse the decision of the district court and direct the district court to dismiss the complaint against Israel.

REVERSED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED
SEP 15 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

CIVIL PRETRIAL MINUTES

Date: September 15, 1995

Case No: C 94 2785 CAL Judge: CHARLES A. LEGGE

Title: Robert Lane -v- National Airmotive Corp., etal

Attorney: Daniel Bacon Barbara Morris / Peter Ostroff

Deputy Clerk: Rufino C. Santos Court Reporter: Judith Dudeck

PROCEEDINGS

1) Defendant NAC's Motion to Dismissed - - DENIED.
2) Defendant Ministry of Defenses' Motion to Dismiss -- DENIED.
3) Further Case Management Conference -- HELD.
4) _____

Order to be prepared by: ( ) Pltf ( ) Deft ( ) Court

Case continued to 10/13/95 @ 11:00 am for Further Conference
Case continued to _____ for motions
(Motion due _____, Opposition _____, Reply _____)
Case continued to _____ for Pretrial Conference
Case continued to _____for Trial (Court/Jury: __Days)
Case continued to _____ for _____
Discovered Cutoff: _____ Designated Experts by _____
ORDERED AFTER HEARING: On the motion of plaintiff the 11th and 12th causes of action are dismissed.

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Daniel Ray Bacon, Esquire, State Bar #103866
LAW OFFICES OF DANIEL RAY BACON
1355 Market Street, Suite 326
San Francisco, California 94103-1316
Telephone: (415) 864-0907
Facsimile: (415) 946-0989

Attorney for Plaintiff
ROBERT LANE

ORIGINAL
FILED
AUG -3 1994

DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT LANE Plaintiff, vs. NATIONAL AIRMOTIVE CORPORATION, a California Corporation and MINISTRY OF DEFENSE STATE OF ISRAEL, Defendants.	C94 2785 CW CASE NO. JURY DEMAND AS TO CERTAIN CAUSES OF ACTION

COMPLAINT FOR DAMAGES AND DECLARATORY RELIEF: [1] DECLARATORY RELIEF, 28 U.S.C.S. 1605 (a) (2) & 2201; [2] DAMAGES FOR LOSS OF PROPERTY 28 U.S.C.S. 1605 (a) (5); [3] BREACH OF CONTRACT, THIRD PARTY BENEFICIARY; . . .

COMPLAINT

Plaintiff for his cause of action against Defendants MINISTRY OF DEFENSE, STATE OF ISRAEL, and NATIONAL AIRMOTIVE CORPORATION, alleges:

I.

PARTIES

1. Plaintiff, ROBERT LANE (hereinafter "Plaintiff" or LANE), is a citizen of the United States. At all times mentioned herein, he was and is a resident of San Leandro, California and, at all times mentioned herein, until August 26, 1993, was employed by defendant NAC.

2. Defendant MINISTRY OF DEFENSE, STATE OF ISRAEL, (hereinafter "ISRAEL") is a sovereign foreign state.

3. Defendant NATIONAL AIRMOTIVE CORPORATION (hereinafter "NAC") is a corporation duly organized and existing under the laws of the State of California, with its principal place of business in Oakland, County of Alameda, State of California.

II.

JURISDICTION AND VENUE

4. This action arises under U.S.C. Sections 1601 et seq. ("foreign sovereign immunities act") and this Court's supplemental jurisdiction. Subject matter jurisdiction of this Court is invoked under U.S.C. Section 1330 (a) and 28 U.S.C. Section 1367 (a) (supplemental jurisdiction of this Court). This court has personal jurisdiction over the Ministry of Defense, State of Israel under 28 U.S.C. Section 1330.

5. Venue is proper in this District under 28 U.S.C. Section 1391 (f) (1,3).

III.

FACTS COMMON TO ALL COUNTS

FIRST CAUSE OF ACTION

(DECLARATORY JUDGMENT; 28 U.S.C. Sects. 1605 (a) (2) & 2201).

(AGAINST BOTH DEFENDANTS)

6. There is not existing between the parties hereto an actual, justifiable controversy in respect to which Plaintiff is entitled to have a declaration of his rights and further relief, including damages, because of the facts, conditions, and circumstances hereinafter set out.

COMPLAINT

7. Plaintiff entered the employ of defendant NAC on or about January 10, 1982, beginning as an Inventory Control Manager and, thereafter, successively became a Systems Analyst, Manager of Special Programs, Director of Customer Support, Director of Special Programs, Director of Safety and Environment, and Facility Manager, all in the employ of defendant NAC.

8. On or about August 22, 2985, Defendant NAC entered into a commercial contract with Defendant ISRAEL, (to be governed by the laws of the State of New York) to provide the services, technical assistance, spare parts, and materials required to repair and remanufacture certain engines for the use of defendant ISRAEL's Air Force. The said contracts were amended several times during the period of 1986 and 1990. Defendant NAC and ISRAEL also entered into subsequent purchase orders for particular items and services not covered by the aforementioned contracts and amendments thereto.

9. Pursuant to his contract of employment with defendant NAC, Plaintiff, as Manager of Special Programs, Director of Customer Support, and Director of Special Programs, all for defendant NAC,

performed services for his employer, Defendant NAC, in regard to the aforesaid contracts between NAC and ISRAEL. In said positions, Plaintiff acted as a central coordinator, regarding technical and administrative questions for defendant ISRAEL, in regards to defendant NAC's contracts with defendant ISRAEL. However, Plaintiff had no decision-making or policy-making duties in regard to the contracts between NAC and ISRAEL.

10. Defendant NAC's contractual relationship with defendant ISRAEL, was the subject of extended investigation by the United States of America, acting through its Department of Justice. In connection with said investigation, defendant NAC entered into a Plea Agreement with the United States of America by which defendant NAC pleaded guilty to a 31 count Information charging violations of Title 18, United States Code, Section 371 (conspiracy to defraud the United States and to commit offenses against the United States) and Title 18, United States Code, Section 287 (submitting false claims to the United States). As part of said Plea Agreement, defendant NAC agreed to pay and did pay a criminal fine of $1,250,000 plus a special assessment of $6,200.00 to the

Clerk of the District Court as required by Title 18, United States Code, Section 3013. Further, Defendant NAC entered into a Civil Settlement Agreement, on or about July 2, 1993, with the United States of America, acting through its Department of Justice, relating to the claims of the United States against Defendant NAC based on the conduct described in the aforementioned Plea Agreement, whereby Defendant NAC agreed to pay and did pay $1,750,000 in civil fines to the United States, in addition to the payment of the aforesaid criminal fine and special assessment. Said Plea Agreement and Civil Settlement Agreement were filed with the Clerk of the United States District Court for the Northern District of California, Criminal Case No. 93-377-CAL, on or about July 16, 1993.

11. Defendant NAC also entered into an Administrative Settlement Agreement with the United States Department of the Air Force, acting as Lead Agency on behalf of the United States Department of Defense, in regard to debarment proceedings against defendant NAC on account of the aforesaid contract with defendant

ISRAEL. A true and correct copy of the aforementioned Administrative Settlement Agreement is attached hereto and incorporated herein as Exhibit A-1 through A-9.

12. From approximately October, 1990 until December, 1992, NAC conducted an internal investigation concerning NAC's handling of the Government of Israel contracts. Plaintiff was found to have no culpability or responsibility for any wrongdoing or illegal activity related to the Government of Israel contracts.

13. Plaintiff was placed on administrative leave on June 23, 1993 and promised future secure employment working in another area of responsibility for NAC.

14. On or about August 27, 1993, Defendant NAC breached its contract of employment with Plaintiff and terminated Plaintiff, alleging in its notification of termination, that Plaintiff was "being terminated for cause" and that, "[t]he basis for termination include your involvement in various unlawful acts relating to the Government of Israel contract and your commission of other improper acts, such as your unauthorized removal of a sensitive document from the company's premises." A true and correct copy

of the said notice of termination, dated August 26, 1993, from NAC to Plaintiff, terminating Plaintiff's employment, is attached hereto and incorporated herein as Exhibit B to this Complaint.

15. An actual controversy has arisen and not exists between Plaintiff and Defendants NAC and ISRAEL concerning their respective rights and duties in that Defendant NAC contends that Plaintiff committed "various unlawful acts relating to the Government of Israel contract" and, therefore, that its termination of Plaintiff's employment with Defendant NAC is legal and proper. Plaintiff contends that at no time has he ever committed any "unlawful acts" of any nature whatsoever "relating to the Government of Israel contract" (or otherwise), either alone or in conjunction with Defendant ISRAEL, that any "unlawful acts" (if any there were) "relating to the Government of Israel contract" were committed solely by defendant ISRAEL and/or defendant NAC or their respective agents, servants and employees, without any participation, involvement, or assistance of any nature whatsoever of or by Plaintiff; and, that, therefore, Defendant NAC's termination of its contract with Plaintiff was wrongful. On

information and belief, Plaintiff alleges that Defendant ISRAEL contends that it committed no illegal acts with Plaintiff under the commercial contracts between NAC and ISRAEL within the United States.

16. Plaintiff desires a judicial determination of his rights and duties, including but not limited to a declaration that Plaintiff committed no "unlawful" acts under the contracts between NAC and ISRAEL and that, therefore, his termination based upon such alleged grounds was wrongful.

17. On or about June 29, 1994, Plaintiff was served by the United States Department of Justice, Criminal Division, with a subpoena to testify before the Grand Jury in the Western District of Texas, San Antonio, Texas, on July 15, 1994, regarding the actions of Yechiel Bart. Mr. Bart worked from July 1986 through August, 1990, for the Government of Israel, Ministry of Defense, and was involved in the aforementioned contract between defendants NAC and Government of Israel. Plaintiff testified before the Grand Jury, pursuant to said subpoena, on July 15, 1994. Attached hereto and incorporated herein as Exhibit C-1 through C-4 is a true and correct

copy of the Subpoena and the papers attached thereto served upon Plaintiff.

18. A judicial declaration is necessary and appropriate at this time under the circumstances in order that Plaintiff may ascertain his rights and duties under the aforesaid agreement between Defendants.

19. As a proximate result of Defendant NAC's wrongful conduct, Plaintiff has been damaged in a sum to be determined according to proof at trial.

WHEREFORE, Plaintiff prays for a declaration of his rights and duties as against defendants NAC and ISRAEL as herein set forth;

SECOND CAUSE OF ACTION

(DAMAGES FOR LOSS OF PROPERTY)
[28 U.S.C.S. 1605 (a) (5)]
(AGAINST DEFENDANT STATE OF ISRAEL ONLY)

20. Plaintiff hereby realleges and incorporates by reference as though fully set forth herein all allegations contained in paragraphs 1 through 19, inclusive, above of this complaint.

COMPLAINT

21. Plaintiff is informed and believes and, based upon said information and belief, alleges that Defendant ISRAEL committed tortious acts within the United States and the territorial jurisdiction thereof, in connection with its aforesaid contracts with Defendant NAC, and that said tortious acts included, but were not limited to, attempting to conspire with Defendant NAC to set aside funds, in one or more special accounts, known as the "Special Project Fund", for use by Defendant ISRAEL for purposes that had not been approved or authorized for funding by the United States, the existence and use of which accounts was required by the laws of the United States to be made known to the United States but which were not made known to the United States. As a proximate result of the said tortious actions of Defendant ISRAEL, all occurring within the United States and within the territorial jurisdiction of the United States, Defendant ISRAEL, caused Plaintiff to lose his property; to wit, his job with Defendant NAC, and caused Plaintiff to be injured and damaged and Plaintiff was thereby injured and damaged and lost his property, to wit, his job with Defendant NAC, all as a proximate result of the aforementioned tortious acts of Defendant

ISRAEL occurring in the United States and within the territorial jurisdiction of the United States, in violation of 28 U.S.C.S. 1605 (a) (5).

WHEREFORE, Plaintiff prays for judgment, including but not limited to damages for loss of his property, against Defendant ISRAEL as hereinafter set forth.

THIRD CAUSE OF ACTION

(BREACH OF CONTRACT, THIRD PARTY BENEFICIARY) [AGAINST DEFENDANT ISRAEL ONLY]

22. Plaintiff hereby realleges and incorporates by reference as though fully set forth herein all allegations contained in paragraphs 1 through 21, inclusive, above of this complaint.

23. The aforesaid contracts between Defendant ISRAEL and Defendant NAC were made for the benefit of Plaintiff in that, by the said agreement, Defendant NAC was required to provide the services required to perform the work called for under the aforesaid contracts between the aforesaid Defendants and Defendant ISRAEL intended to provide monies for the salaries of NAC employees for fulfillment of the aforesaid contracts.

24. In overseeing and administering the disbursement of federal funds to Defendant ISRAEL for purchase of military equipment from commercial suppliers, such as Defendant NAC, the United States required during the entire relevant period of time herein that Defendant ISRAEL submit to the United States for advance approval all proposed commercial contracts in excess of $500,000 to the United States for approval after award. In violation of said requirement, Defendant ISRAEL, failed to obtain all necessary approvals from the United States government in connection with the work performed under the aforesaid contracts between Defendants on the engines and all other times and services thereunder.

25. Defendant ISRAEL, by its various wrongful actions, as hereinabove alleged, including but not limited to its aforesaid failure to obtain all necessary approvals from the United States in connection with the work performed under the aforesaid contracts between the Defendants; and, by its aforesaid attempt to conspire with Defendant NAC to set aside funds for use by Defendant ISRAEL in one or more special accounts, the existence of which accounts was required by the laws of the United States to be made

known to the United States but which were not made known to the United States, Defendant ISRAEL breached its aforesaid contracts with Defendant NAC to the detriment and injury of Plaintiff, in that Plaintiff was no longer permitted to enjoy the benefits of the aforesaid agreement between defendant NAC and defendant ISRAEL since he had been terminated from his job with defendant NAC as a proximate result of the aforesaid breaches by defendant ISRAEL.

26. As the proximate result of the breach of the said agreements, Plaintiff has been damaged and has suffered loss of income, pension benefits and other benefits of his employment, all according to proof at trial.

WHEREFORE, Plaintiff prays for judgment against Defendant ISRAEL as hereinafter set forth; . . .

NAC

August 26, 1993

Via Federal Express

Mr. Bob Lane
1760 Bancroft Avenue
San Leandro, CA 94577

Dear Bob:

This letter is to notify you that effective August 27, 1993 your employment with National Airmotive Corporation will be terminated. The basis for termination include your involvement in various unlawful acts relating to the Government of Israel contract and your commission of other improper acts, such as your unauthorized removal of a sensitive document from the company's premises.

As you know, we have been reducing out work force for economic reasons. Although you are being terminated for cause, we have decided, in light of your years of service to the company, to afford you the same severance formula we have been using in the recent reductions in force. Consequently, you will receive seven weeks of severance pay and three months of benefits coverage. Your benefits will be covered through November 30, 1993 at which time you can elect to continue benefits through COBRA.

Enclosed are your final paychecks, which include your severance pay and accrued vacation hours, as well as information regarding COBRA. If you have any questions regarding this matter, please direct them to us through you counsel.

Very truly yours,

NATIONAL AIRMOTIVE CORPORATION

|S| Gerry Roberts

Gerry Roberts, President

GR/ml
Encls.

7200 Lockheed Street, Oakland, California 94621-4504 Tel: 510.613.1000/Fax: 510.562.7426/Telex: 160750/1-800-NAC-CORP

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, Plaintiff vs. YECHIEL BART (i),. . . Defendants.	)	CRIMINAL ACTION NO. SA-94-CR-244 **Violations:** ***Counts 1 through 8*** [Mail Fraud, 18 U.S.C. § 1341] ***Counts 9 through 17*** [Wire Fraud, 18 U.S.C. § 1343] ***Counts 18 through 21*** [Interstate Transport, 18 U.S.C. § 2314] ***Counts 22 through 24*** [Money Laundering, 18 U.S.C. § 1957] ***Count 25 through 29*** [Forfeiture, 18 U.S.C. § 982 (a) (1) and 982 (b) (1) (A)]

VERDICT

WE, THE JURY, UNANIMOUSLY FIND: The Defendants, as charged in each of the following Counts of the Superseding Indictment:

COUNT	DEFENDANT	GUILTY	NOT GUILTY
1	YECHIEL BART		✔
2	YECHIEL BART		✔
3	YECHIEL BART		✔
4	YECHIEL BART		✔
5	YECHIEL BART		✔

COUNT	DEFENDANT	GUILTY	NOT GUILTY
6	YECHIEL BART		✔
7	YECHIEL BART		✔
8	YECHIEL BART	✔	
9	YECHIEL BART	✔	
10	YECHIEL BART		✔
11	YECHIEL BART		✔
12	YECHIEL BART		✔
13	YECHIEL BART	✔	
14	YECHIEL BART		✔
15	YECHIEL BART		✔
16	YECHIEL BART	✔	
17	YECHIEL BART	✔	
18	YECHIEL BART	✔	
19	YECHIEL BART	✔	
20	YECHIEL BART	✔	
21	YECHIEL BART		✔
22	YECHIEL BART		✔
23	YECHIEL BART	✔	
24	YECHIEL BART	✔	
25	YECHIEL BART	✔	
26	YECHIEL BART	✔	
27	YECHIEL BART		✔
28	YECHIEL BART		✔
29	YECHIEL BART	✔	

|S| Stacy J. Flowers
PRESIDING JUROR'S SIGNATURE

DATE: Aug. 11, 1995

AO 89 (Rev. 11/91) Subpoena in a Criminal Case

United States District Court

WESTERN TEXAS

DISTRICT OF

UNITED STATES OF AMERICA

SUBPOENA IN A CRIMINAL CASE

V.

YECHIEL BART, ET AL.

CASE NUMBER: SA-94-CR-244

TO: ROBERT LANE

[X] YOU ARE COMMANDED to appear in the United States District Court at the place, date and time specified below to testify in the above case.

PLACE	COURTROOM
UNITED STATES COURTHOUSE 655 E. DURANGO BLVD. SAN ANTONIO, TEXAS	HONORABLE FRED BIERY 1ST FLOOR, COURTROOM #1 **DATE AND TIME** NOVEMBER 28, 1994 9:00 A.M.

[ ] YOU ARE ALSO COMMANDED to bring with you the following document (s) or object (s):

U.S. MAGISTRATE JUDGE OR CLERK OF COURT	DATE
/S/ Beverly Nolden	11/08/94
(BY) DEPUTY CLERK	
UNITED STATES DISTRICT CLERK	

ATTORNEY NAME ADDRESS AND PHONE NUMBER

CHRISTOPHER VARNER, TRIAL ATTORNEY,
U.S. DEPARTMENT OF JUSTICE
P.O. BOX 28188 – CENTRAL STATION
WASHINGTON, DC 20038 Tel. (202) 514-0672

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UNITED STATES CODE
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PARTY IV - JURISDICTION AND VENUE
CHAPTER 85 - DISTRICT COURTS; JURISDICTION

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§ 1330. Actions against foreign states

- (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
- (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.
- (c) For purpose of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

UNITED STATES CODE
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PARTY IV - JURISDICTION AND VENUE
CHAPTER 97 - JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

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§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interest of justice and would protect the

rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

---

§ 1603. Definitions

For the purposes of this chapter -

- (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
- (b) An "agency or instrumentality of a foreign state" means an entity -
    - ☐ (1) which is a separate legal person, corporate or otherwise, and
    - ☐ (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
    - ☐ (3) which is neither a citizen of a State of the Unites States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.
- (c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.
- (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined

by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

- (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

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§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in section 1605 to 1607 of this chapter.

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§ 1605. General exceptions to the jurisdictional immunity of a foreign state

- (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -
  - (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
  - (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
  - (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the

United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

- ☐ (4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;
- ☐ (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and causes by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except in this paragraph shall not apply to -
  - (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
  - (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or
- ☐ (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement

in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

- (b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That -
  - (1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and
  - (2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.
- (c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state

may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

- (d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

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§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

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§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim -

- (a) for which a foreign state would not be entitled to immunity under section 1605 or this chapter had such claim been brought in a separate action against the foreign state; or
- (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or
- (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

FILED
APR 30 1997
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No. 96-1545

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ROBERT LANE,
Petitioner,
v.
MINISTRY OF DEFENSE, STATE OF ISRAEL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held on the particular facts of this case that petitioner's claims against Israel must be dismissed under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*

LIST OF PARTIES AND RULE 29.6 LIST

The parties to this case are petitioner Robert Lane and respondents Ministry of Defense, State of Israel and National Airmotive Corporation, a California corporation.

National Airmotive Corporation is a wholly owned subsidiary of First Aviation Services, Inc., which in turn is wholly owned by First Equity Development, Inc.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

Respondent Ministry of Defense, State of Israel ("Israel") hereby opposes the petition for a writ of certiorari filed by petitioner Robert Lane.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this matter are the "commercial activity" and the "noncommercial tort" exceptions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1605(a)(2), (5).

STATEMENT OF THE CASE

Petitioner's employer, National Airmotive Corporation ("NAC"), terminated his employment because it concluded petitioner had personally engaged in serious misconduct during his employment. By this suit, petitioner seeks to hold Israel responsible for his termination. He does so even though Israel took no part in NAC's decision and, as his complaint acknowledges, Israel is a

"sovereign foreign state", ER 3 ¶ 2,[1] presumptively immune from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* ("FSIA"). The court of appeals held that there is no jurisdiction over Israel in this case and no reason exists to disturb that holding.

1. Between 1985 and 1990, NAC and Israel entered into a series of contracts under which NAC agreed to provide Israel services, technical assistance, spare parts and materials required to repair and remanufacture engines for use by Israel's Air Force. ER 4,5 ¶¶ 7-9; Req. Not. As Manager of Special Programs, Director of Customer Support, and later Director of Special Programs for NAC, petitioner performed a variety of technical and administrative services related to these contracts. ER 4,5 ¶¶ 7-9.

Israel's purchase of these defense goods and services from NAC was funded by the United States government through the Department of Defense's Foreign Military Financing ("FMF") Program. ER 39. This program, authorized by the Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2751-2799, allows the use of funds appropriated by Congress to finance the "procurement of defense articles, defense services, and design and construction services by friendly foreign countries and international organizations." 22 U.S.C. § 2763(a).

2. The United States Department of Justice conducted an investigation of criminal activity committed by NAC in connection with its contracts with Israel—including conspiring to defraud the United States and submitting claims which falsely represented that United States funds were being used for approved FMF program purposes when in fact they were not. ER 5-6 ¶ 10; ER 39-47.

As a result of these investigations, NAC entered into a plea agreement with the Department of Justice in July

[1] "ER" refers to the Appellant's Excerpt of Records on appeal to the Ninth Circuit. "Req. Not." refers to Appellant's Request for Judicial Notice on appeal.

1993, under which NAC agreed to pay a total of $3,000,000 in civil and criminal penalties to the United States. ER 39. NAC also entered into an Administrative Settlement Agreement with the Department of Defense under which it agreed to terminate or not re-employ those employees whose actions were responsible for NAC's violations of law. ER 42-44.[2]

NAC also conducted its own internal investigation to identify individuals responsible for the misconduct found by the United States' investigation. As a result of this investigation, petitioner was placed on administrative leave in June 1993, ER 7 ¶ 13, and in August 1993 informed by letter that his employment was terminated. ER 7 ¶ 14. The letter stated that, "[t]he basis for termination include [sic] your involvement in various unlawful acts relating to the Government of Israel contract and your commission of other improper acts, such as your unauthorized removal of a sensitive document from the company's premises." *Id.*

3. On August 3, 1994, petitioner filed this action alleging wrongful termination by NAC under state law. ER 1. The central allegation of the complaint is that the "unlawful acts" NAC cited as the basis of petitioner's termination were committed not by him, but by NAC and Israel. ER 8, 10, 12 ¶¶ 15, 21, 25. Petitioner alleges that by improperly holding him responsible for Israel's conduct, NAC breached its employment contract with him and, in some unexplained fashion, NAC's procurement contracts with Israel. ER 11-13 ¶¶ 23-25.

Although petitioner does not allege that Israel played any role whatsoever in NAC's decision to terminate his employment, he names Israel as a defendant in the first three of his 13 causes of action. Petitioner's first claim

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[2] Petitioner has misleadingly included in the appendix to his Petition what purports to be the jury's verdict against former Israel employee Yechiel Bart. Pet. App. A-31. Mr. Bart was neither indicted nor convicted for his activities relating to Israel's contracts with NAC.

alleges that an "actual controversy" exists between him, NAC and Israel as to whether NAC's termination of his employment was "legal and proper." Petitioner alleges that NAC's termination of its contract with him was "wrongful" because he never "committed any unlawful acts . . . relating to the Government of Israel Contract" and that any "unlawful acts . . . were committed solely by defendant ISRAEL and/or defendant NAC . . . ." ER 8 ¶ 15. He seeks, based on these allegations, a declaration of his "rights and duties," if any, under the contracts between NAC and Israel. *Id.*

Petitioner's second claim for "loss of property" is also based on Israel's alleged responsibility for the unlawful activity that NAC cited as the reason for terminating his employment. It alleges that Israel committed "tortious acts" by "attempting to conspire with NAC to set aside funds, in one or more special accounts . . . for use by Defendant ISRAEL for purposes that had not been approved or authorized for funding by the United States . . . ." ER 10 ¶ 21. Without explaining how, petitioner alleges this conduct "caused Plaintiff to lose his property, to wit, his job with Defendant NAC." ER 11 ¶ 21. Petitioner makes no attempt to specify what tort Israel committed or how it caused his injury.

Finally, although the procurement contracts between Israel and NAC expressly state that there are no third party beneficiaries,[3] petitioner also asserts a claim for breach of those contracts on an intended third-party beneficiary theory. ER 10-12 ¶¶ 24-25. He asserts that Israel breached those contracts by (1) failing to obtain approvals required under the AECA for specified commercial contracts, ER 12 ¶ 24, and (2) diverting funds paid by the United States under the FMF program to "special

---

[3] Req. Not., Contract T-56-A-15, Article 15; Contract 250-C20, Article 15 (providing that Israel may terminate the contract "at its convenience and discretion"). *See also* Req. Not., Contract T-56-A-15, Article 25.7; Contract 250-C20, Article 25.7 ("no party is intended to or shall have any right or interest under this Contract, except as provided above").

accounts" to be used for purposes not authorized by the AECA. ER 10-11 ¶ 25. Petitioner also alleges, again without explaining how, that these breaches caused him to be terminated by NAC. ER 12-13 ¶ 25.

Significantly, petitioner does not allege that Israel failed either to accept or to pay for all the goods and services covered by the Israel-NAC contracts or that Israel breached any specific provision of those contracts. Nor does he attempt to plead what terms of the Israel-NAC contracts show any intent by either Israel or NAC to benefit him either individually or as a member of a class.

In sum, this is simply a wrongful termination action in which an employee claims his employer wrongly blamed him for a third party's misconduct and therefore had no proper cause to terminate him. Rather than simply challenge the validity of his employer's discharge, petitioner also seeks to attach liability to the third party, even though he makes no allegation that the third party participated in or affected the termination decision in any respect.

Petitioner's complaint attempts to avoid the immunity provided to sovereign foreign states against such claims by asserting that all three of his claims against Israel fall within the "commercial activity" exception to the FSIA, 28 U.S.C. § 1605(a)(2),[4] and that his so-called "loss of property" claim falls within the "noncommercial tort"

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[4] Section 1605(a)(2) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . .

28 U.S.C. § 1605(a)(2).

exception to the Act, 28 U.S.C. § 1605(a)(5).[5] ER 4, 10 ¶¶ 6, 20; ER 99-103.

4. Israel moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction on the ground that none of petitioner's claims against Israel falls within either the "commercial activity" or the "noncommercial tort" exception of the Foreign Sovereign Immunities Act. ER 59-89. Israel requested, in the alternative, dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

The district court denied Israel's motions, finding that the "commercial activity" exception provided subject matter jurisdiction over plaintiff's second cause of action:

> So on its most superficial level it seems to me that [the complaint] does allege that there were contracts, contracts between NAC and the State of Israel. And Paragraph 21 alleges that in connection with those contracts, certain tort or torts occurred.
>
> Now, just that superficially indicates . . . that this cause of action, at least this cause of action, arises out of commercial activity.

ER 169. Based on this analysis, the court further concluded that it had supplemental jurisdiction over the other two claims against Israel. *Id.*

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[5] Section 1605(a)(5) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state . . . .; except this paragraph shall not apply to—
>
> . . . .
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . .

28 U.S.C. § 1605(a)(5).

The district court initially stated that it was making "no ruling" on Israel's 12(b)(6) motion "until we get to the summary judgment point," ER 173, but then indicated that "there is enough allegation in [the second cause of action] of a tort or a breach of contract to hold you in. That's what I am deciding." ER 177.

5. A unanimous panel of the court of appeals reversed the ruling on the 12(b)(1) motion, holding that none of petitioner's claims falls within any exception to sovereign immunity enumerated by the FSIA. Pet. App. A-8 to A-12.

The court of appeals recognized that the applicability of the "commercial activity" exception to petitioner's claims is governed by this Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Pet. App. A-9. In *Nelson*, the Court held that a claim must have "more than a mere connection with, or relation to, commercial activity," to fall within the exception. 507 U.S. at 358. Rather, the particular allegations of a complaint must be "based upon" specific commercial activity by the foreign sovereign defendant. *Id.*

The court of appeals held that none of petitioner's claims satisfied the *Nelson* test. Although the court recognized that "military supply contracts are considered commercial," Pet. App. A-8, it concluded that, "[j]ust as in *Saudi Arabia v. Nelson*, the injuries alleged in [petitioner's] complaint are not more than 'merely related' to the commercial activity of the foreign sovereign." Pet. App. A-10. As it explained,

> [Petitioner]'s grievance arises from his termination by NAC and out of his employment relationship with NAC. His claims are based not upon Israel's commercial conduct in the United States but upon actions taken by NAC.

Id.

The court then ruled that petitioner's tort claim does not fall within an enumerated exception to immunity for two reasons. First, his tort claim does not satisfy the "commercial activity" exception (under which it was "properly analyzed") for the reasons it had already explained. Pet. App. A-11. Second, "even if . . . characterized as a noncommercial tort," that claim did not satisfy the noncommercial tort exception of Section 1605 (a)(5)(B) because it "is essentially a claim arising out of interference with contract rights," a claim which is expressly excluded by Section 1605(a)(5)(B) from the definition of non-immunized torts. *Id.*

REASONS FOR DENYING THE PETITION

Petitioner makes three arguments in support of his request for review of the court of appeals' unpublished opinion in this case. First, he argues that the court of appeals' decision "incorrectly applies this Court's decision" in *Nelson*. Pet. at 5. Second, he argues that the court below erroneously held, assertedly in conflict with decisions in other circuits, that the "commercial activity" exception is inapplicable here as a matter of law because there was no commercial relationship between petitioner and Israel. *Id.* at 9. Finally, he argues that the court of appeals erroneously held, again assertedly in conflict with other circuits, that a claim for interference with contract can never satisfy the "commercial activity" exception. *Id.* at 13-14.

Contrary to petitioner's contention, the court of appeals' decision is completely faithful to this Court's decision in *Nelson*. Moreover, the decision below is plainly correct, and does not create a conflict among the circuits. To the contrary, the court of appeals correctly applied the rule enunciated in *Nelson* to the specific allegations pled in petitioner's complaint. Indeed, the court of appeals never decided, nor did it need to decide, the points of law which petitioner wrongly characterizes as inter-circuit conflicts. This case thus does not present any important or novel legal question, only the straightforward application of the *Nelson* test to petitioner's specific factual allegations.

I. PETITIONER'S ASSERTION THAT THE COURT OF APPEALS MISAPPLIED THE RULE OF *NELSON* TO THE PARTICULAR FACTS OF THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioner's primary argument is that the court of appeals failed properly to apply this Court's holding in *Nelson*. In that case, this Court held that the phrase "claim based upon a commercial activity" in § 1605(a)(2) requires a careful identification of the "particular conduct on which the . . . action is 'based' for purposes of the Act." 507 U.S. at 356. In addition, the Court reasoned that the language requires "more than a mere connection with, or relation to, commercial activity." *Id.* at 358. As applied in that case, the Court concluded that the hiring of the plaintiffs by Saudi Arabia could be characterized as commercial, but the act of torture by the State, which was the real basis for their claim, was not "based on" that commercial activity.

The Court expressly rejected a "but for" causation theory as insufficient to satisfy the FSIA's "based upon commercial activity" requirement, concluding that, while Saudi Arabia's hiring activities "led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit." *Id.* at 358. Moreover, the Court rejected as a "semantic ploy" plaintiffs' argument that the injuries arose from a failure to warn them during the hiring process. *Id.* at 363.

Nelson controls this case and requires dismissal for want of jurisdiction. A "careful identification" of the conduct giving rise to petitioner's claim here plainly reveals, as the court of appeals correctly observed, that "[petitioner]'s grievance arises from his termination by NAC . . . [and is] not [based] upon Israel's commercial conduct in the United States . . . ." Pet. App. A-10.[6]

[6] If anything, petitioner's claim is weaker than the Nelsons'. In *Nelson*, Saudi Arabia engaged in commercial activity directly with the plaintiffs and engaged in activities that injured them. Nevertheless, the Court held that the relationship between the hiring and

Nor can petitioner avoid this conclusion by artful pleading. He asserts that his complaint is tied "directly" to Israel's performance of its contracts. Pet. at 8. But inserting the word "directly" is still a "semantic ploy" that cannot conceal the essential nature of this claim for wrongful termination by NAC.

Finally, petitioner's arguments concerning *Nelson* are inherently unworthy of review by this Court. He does not contend, nor could he, that the court of appeals purported to do anything other than apply this Court's holding in *Nelson* to the peculiar facts of his case. Under these circumstances, this case is hopelessly factbound and therefore does not warrant further review by this Court.[7]

II. THE COURT OF APPEALS DID NOT, AS PETITIONER CONTENDS, CONSTRUE THE "COMMERCIAL ACTIVITY" EXCEPTION TO REQUIRE A DIRECT COMMERCIAL RELATIONSHIP BETWEEN PETITIONER AND ISRAEL.

Petitioner next argues that the Ninth Circuit erroneously held that the "commercial activity" exception is inapplica-

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the injury was too attenuated. Here, the commercial activity is between Israel and a third party. Petitioner has no claim against Israel absent his termination from NAC. To leapfrog NAC's conduct and attach liability to Israel would be to resurrect the "mere connection with, or relation to, commercial activity" test this Court expressly rejected in *Nelson*. 507 U.S. at 358.

[7] *Walter-Fuller Aircraft Sales v. Republic of the Philippines*, 965 F.2d 1375 (5th Cir. 1992) and *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), on which petitioner relies, are not to the contrary. In both of those cases, unlike here, the plaintiff demonstrated not only that the defendant engaged in commercial activity, but also that the commercial activity was the specific conduct on which the suit was based. *Walter-Fuller*, 965 F.2d at 1384-86 (commercial activity exception applicable to suit by an American who purchased an aircraft from the Philippines for breach of contractual obligation to defend the purchaser against any subsequent claims by third parties of title to the aircraft); *Joseph*, 830 F.2d at 1024 (commercial activity applicable to landlord's claim against tenant Nigeria for conversion, trespass, breach of contract and waste).

ble here as a matter of law because there was no commercial relationship between himself and Israel. Pet. at 9. According to petitioner, this "holding" conflicts with the Seventh Circuit's decision in *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574 (7th Cir. 1989), which held that the "commercial activity" exception may apply even in the absence of a contractual relationship between the plaintiff and the defendant. Petitioner's argument rests on a fundamental misreading of the court of appeals' opinion in this case, which does not in any way conflict with *Rush*.

The court of appeals' opinion does not suggest that the "commercial activity" exception is inapplicable here simply because petitioner did not have a direct contractual relationship with Israel. To be sure, the court of appeals correctly mentioned in passing that petitioner had no such relationship with Israel. Pet. App. A-10. Nevertheless, the opinion makes clear that this observation is not the basis of the court of appeals' holding. Rather, as explained above, the court held that "the injuries alleged in the complaint are not more than 'merely related' to the commercial activity of the foreign sovereign." *Id.*[8] Thus, the court of appeals' opinion here does not in any way conflict with the Seventh Circuit's decision in *Rush*.

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[8] By contrast, in *Rush* the contract was for the provision of heart transplant operations, which the plaintiff hospitals supplied and for which the Government of Greece refused to pay. Thus, its holding that the hospitals' claims for reimbursement were based on Greece's commercial activities seems plainly correct and is just as plainly not at all helpful to petitioner here.

III. THE COURT OF APPEALS, CONTRARY TO PETITIONER'S ASSERTION, APPLIED THE "COMMERCIAL ACTIVITY" EXCEPTION WITHOUT CONSIDERING WHETHER ANY OF PETITIONER'S CLAIMS FELL WITHIN THE SEPARATE "NONCOMMERCIAL TORT" EXCEPTION.

Finally, petitioner argues that the court of appeals erred in holding that the "commercial activity" exception can never be satisfied by a claim for interference with contract because that tort is expressly excluded from the "noncommercial tort" exception. Pet. at 13-14. Petitioner asserts that this holding conflicts with the Fifth and Sixth Circuits' holdings in *Gould, Inc. v. Pechiney Ugine Kuhlmann,* 853 F.2d 445 (6th Cir. 1988), and *Walter-Fuller,* 965 F.2d 1375, that claims for interference with contract, even if excluded from the "noncommercial tort" exception, may nevertheless fall within the "commercial activity" exception. Petitioner's argument again rests on a manifest misreading of the court of appeals' opinion.

After concluding that *none* of petitioner's claims falls within the "commercial activity" exception, Pet. App. A-10, the court of appeals went on *independently* to analyze whether petitioner's second cause of action for "loss of property" fell within the "noncommercial tort" exception. In considering this issue, the court of appeals first concluded that this claim, which Israel demonstrated and petitioner conceded before the court of appeals is not a cognizable tort claim, should not be analyzed under the "noncommercial tort" exception at all, but rather "is properly analyzed under the commercial activity exception." Pet. App. A-11.

The court of appeals went on to conclude that,

> *even if* [*petitioner*]*'s action is characterized as a noncommercial tort claim,* Israel retains immunity under Section 1605(a)(5)(B). [Petitioner]'s loss of property claim . . . is essentially a claim arising out of interference with contract rights. The exception to

> the noncommercial tort exception therefore preserves immunity for Israel.

Id. (emphasis added). Petitioner never mentions, let alone criticizes, this correct holding, which compelled the dismissal of his "loss of property" claim under the "noncommercial tort" exception. Certainly, this alternative holding raises no issue warranting review by this Court.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

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